



Citation: *Li v. Canada (Minister of Public Safety and Emergency Preparedness)*,
2016 CART 11

Date: 20160413
Docket: CART/CRAC-1861

BETWEEN:

Luen Wah Li, Applicant

- and -

Minister of Public Safety and Emergency Preparedness, Respondent

BEFORE: Chairperson Donald Buckingham

**WITH: Luen Wah Li, self-represented; and
Melanie A. Charbonneau and Sherri-Lynn Foran, representatives for
the respondent**

In the matter of a request made by the applicant, pursuant to subsection 13(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review by the Tribunal of the Minister's decision CS-69635 dated September 14, 2015, holding that the applicant violated section 40 of the *Health of Animals Regulations*.

DECISION

Following a review of the decision of the Minister of Public Safety and Emergency Preparedness and the reasons for that decision issued September 14, 2015, and a review of all written submissions of the parties, the Canada Agricultural Review Tribunal, by order, VARIES in part but otherwise CONFIRMS the decision of the Minister. As a result, the monetary penalty of \$800 is payable by Luen Wah Li to the Canada Border Services Agency under Notice of Violation YVR09725 within thirty (30) days after the day on which this decision is served.

By written submissions only.

OVERVIEW

[1] This case is about whether the Canada Agricultural Review Tribunal (Tribunal) should confirm, vary or set aside a decision of the Minister of Public Safety and Emergency Preparedness (Minister's Decision) dated September 14, 2015, finding against Luen Wah Li (Mr. Li).

[2] The Minister's Decision holds that, on the basis of Canada Border Services Agency (Agency) officials finding about 3 kg of pork sausage from China, in the luggage of Mr. Li, upon his return to Canada, Mr. Li contravened section 40 of the *Health of Animals Regulations* (HA Regulations) and was validly issued a Notice of Violation with a penalty of \$800.

[3] Mr. Li does not contest that he imported the pork sausage, that it is a meat product, or that he failed to declare the product to Agency officials prior to secondary inspection of his luggage. Mr. Li also does not contest that he did not have any certificates or permits, which would have allowed the importation. What Mr. Li raises as reasons for his challenge are that he had no knowledge of the meat in his luggage, that he had a language problem when discussing this matter with Agency officials on the day of the alleged violation, and, that due to the circumstances of the case, he would like the amount of the penalty waived or reduced.

[4] There are two issues in this case:

- i. whether, given the record before the Tribunal, the Minister erred in his finding that the Agency has proven all the necessary elements of the violation required to sustain the Notice of Violation with Penalty; and
- ii. whether Mr. Li's language proficiency in English was so minimal that he has a defence to the commission of the violation.

REASONS

1. Background

[5] On December 25, 2012, at the Vancouver airport, Agency officials inspected Mr. Li's luggage and found almost 3 kg of pork sausage of Chinese origin after an Agency inspector dog indicated Mr. Li's luggage contained animal products. The Agency alleged that Mr. Li did not declare the meat sausage on his Agency E311 Declaration Card (Declaration Card). Nor, the Agency alleges, did he orally declare them to the Agency inspector immediately upon disembarking his airplane, or to the Agency secondary inspector officer prior to their discovery during the secondary inspection. The Agency also alleges that Mr. Li did not present any certificates or permits that would have permitted the importation of the sausages into Canada.

[6] That same day, on the basis of the discovery of the meat sausages, the Agency issued Mr. Li Notice of Violation YVR09725 with a penalty of \$800 for importing undeclared animal by-products, an act which violates section 40 of the HA Regulations.

[7] Ten days later, Mr. Li challenged the Notice of Violation by filing a request for review of the facts of the case to the Minister of Public Safety and Emergency Preparedness (Minister).

[8] The Minister, in his decision of September 14, 2015, upheld the Agency's action to issue a Notice of Violation with a penalty of \$800.

[9] On September 22, 2015, Mr. Li sent a registered letter to the Tribunal requesting that the Tribunal review and set aside the Minister's decision.

2. Applicable Law and Standard of Review

[10] The essential elements for the commission of a violation of section 40 of the HA Regulations require that the Minister be convinced, on a balance of probabilities, that the Agency has proved that Mr. Li:

- i. is the person who committed the violation; and
- ii. imported an animal by-product into Canada.

[11] The *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) provides for a review by the Tribunal of a first-instance decision made by the Minister (subsection 12(2) and paragraph 13(2)(b) of the AMP Act).

[12] Powers given to the Tribunal by Parliament in conducting this exercise are set out in paragraph 14(1)(a) of the AMP Act, "*After concluding a review requested under this Act, the Tribunal shall, by order, as the case may be, (a) confirm, vary or set aside any decision of the Minister...*". As such, the Tribunal performs a function not as a decision-maker of first instance or as a court conducting a judicial review, but rather as a specialized or appellate administrative tribunal reviewing an administrative decision of first instance.

[13] The Tribunal is an expert and independent body constituted by Parliament pursuant to the *Canada Agricultural Products Act*, R.S.C., 1985, c. 20 (4th Supp.) (CAP Act) and its jurisdiction consists of responding to requests to review matters arising from the issuance of agriculture and agri-food administrative monetary penalties (*Hachey Livestock Transport Ltd. v. Minister of Agriculture and Agri-Food*, 2015 CART 19, at paragraphs 12 to 16).

[14] Although the AMP Act does not explicitly set out the type of review to be conducted by the Tribunal, recent jurisprudence (*Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 and *Hachey*, at paragraphs 28 to 50) indicates that the Tribunal should conduct a *de novo* administrative review of a Minister's decision.

[15] This type of review does not require the Tribunal to ask the parties to present anew the evidence in this case. It does, however require the Tribunal to fully examine and consider the evidence presented, to evaluate its relevance and weight, and to review factual findings made by the Minister, including additional factual findings, if any, that may be required for the resolution of the case. As such, the Tribunal must examine facts and draw its own factual and legal conclusions with little or no required deference to the findings, reasoning, and conclusion contained in the Minister's Decision of September 14, 2015.

3. Analysis

Issue #1: Did The Minister Err In His Finding That The Agency Has Proven All The Necessary Elements Of The Violation?

[16] The record shows the following facts occurred on December 25, 2012:

- Mr. Li entered Canada at Vancouver coming from China.
- He signed and completed the English side of the Agency Declaration Card and did not mark on that card that he was bringing any meat products into Canada.
- He proceeded through a primary inspection upon deplaning. There is no evidence of the oral exchange, if any occurred, between Mr. Li and the Agency primary inspection officer that examined Mr. Li's Declaration Card.
- An Agency inspector dog indicated a bag claimed by Mr. Li contained animal products. Mr. Li was then referred to secondary inspection of his luggage. Prior to the inspection of his bags at secondary, Mr. Li was asked if he had meat products and he responded "no". His bags were inspected and meat sausages were found.
- While there is conflicting evidence in the record about exactly when a Cantonese interpreter arrived on the scene and the quality of service provided, by the time Mr. Li was in dialogue with the Agency official conducting the secondary inspection, a Cantonese interpreter was facilitating the linguistic exchange between Mr. Li and the Agency official.
- There is no evidence that Mr. Li offered any certificates or licences to the Agency officials that would have permitted the importation of the meat sausages.

[17] I agree with the conclusions of the Minister with respect to his findings of fact necessary to determine that Mr. Li committed the violation. I also agree that the Minister properly applied the law with respect to defining the elements necessary to substantiate a violation of section 40 of the HA Regulations.

[18] The Minister's decision states that the alleged violation occurred on December 25, 2013. I consider this an inadvertent mistake as all documentation indicates that the date of the alleged violation was December 25, 2012.

[19] I find as fact that the alleged violation did occur on December 25, 2012. As a result, all the required elements of the violation are proven by the Agency in the record as filed.

[20] Where the Agency meets its burden of proof, the applicant will be held liable for a violation under the AMP system, unless he can establish a defence or excuse permitted under the AMP Act, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), or as it pertains to this case, the HA Regulations.

[21] One defence permitted under the HA Regulations is that Mr. Li provided the Agency officials with permits, licences or certificates that would have permitted the importation of the Chinese sausage. Mr. Li produced no such documents.

[22] A justification raised by Mr. Li was that he did not know the sausage was in his luggage so he could not have declared them until found by the Agency official at secondary inspection. Mr. Li maintains that his daughter, out of love for her father, placed the sausages into her father's luggage without his knowledge. This same issue of a clandestine familial love offering, slipped in the luggage of an unknowing family member, has been held by the Federal Court of Appeal not to be a permissible reason to invalidate a Notice of Violation (see *Canada Border Services Agency v. Castillo*, 2013 FCA 271, at paragraph 24). The violation in question is an absolutely liability offence. Moreover, in accordance with section 18 of the AMP Act, due diligence, knowledge or intention-based defences, and mistakes of fact are not permissible defences.

Issue #2: Did Mr. Li's Limited Language Proficiency In English Provide A Defence To His Committing The Violation?

[23] Mr. Li alleges, "there was an obvious language barrier that led to miscommunication between the interpreter, officer and me, which made the situation worse" (*verbatim* from Mr. Li's Request for Review to the Tribunal). He suggests that his language comprehension of English is quite limited.

[24] The Agency argues that the evidence does not show that Mr. Li had a complete inability to appreciate the nature and consequences of his acts because of a difficulty in understanding English.

[25] This Tribunal has considered the issue of an applicant's lack of understanding of an official language of Canada and its possible effect in mounting a defence under subsection 18(2) of the AMP Act (see *Abou-Latif v. Canada (Canada Border Services Agency)*, 2013 CART 35, at paragraphs 34 to 37).

[26] From the record, I am convinced that Mr. Li's language proficiency in English is limited. Still, the evidence provided by the Agency that Mr. Li had a sufficient knowledge of

English is strong; he filled out his Declaration Card; and he did answer some questions in English at secondary inspection even if he did have the assistance of a Cantonese interpreter during at least part of the secondary inspection. There is also evidence given by Mr. Li that he had at least a rudimentary proficiency in English; he submitted documentation to the Minister and to the Tribunal in English, albeit perhaps, with assistance from others.

[27] Based on the record, I find that Mr. Li's language proficiency in English on December 25, 2012, was not so inadequate as to convince me, on a balance of probabilities, that he has made out any defence to the violation permitted under subsection 18(2) of the AMP Act.

[28] Given Parliament's clear intention on the issue of prohibited versus permitted defences, the Tribunal finds that the reasons given by Mr. Li are not permitted defences under section 18 of the AMP Act.

[29] Finally, Mr. Li specifically raised one question requiring further explanation: can the Tribunal reduce the amount of the penalty for humanitarian or financial hardship reasons or for the mere fact that the product he imported on December 25, 2012, can be easily purchase in Chinese supermarkets in Canada?

[30] The short answer is "no". Violations under the HA Regulations are listed in Schedule 1, Part 1, Division 2 of the AMP Regulations. The classification, or severity, to be attributed by enforcement agencies and this Tribunal to a violation of section 40 of the HA Regulations, is as follows:

Item	Provision of HAR	Short-Form Description	Classification
79.	40	Import an animal by-product without meeting the prescribed requirements	Serious

[31] The very strict AMP system established by Parliament, and the penalties set out in the AMP Act, as in this case, can nonetheless have important repercussions for Canadians, especially someone like Mr. Li. Mr. Li lives on a fixed income, which is barely enough to meet his ordinary needs and medical expenses. Unfortunately, the Tribunal cannot vary the penalty imposed in this case based on circumstantial, humanitarian or financial grounds. The Tribunal's power to grant a remedy comes from its enabling statutes. According to these statutes, the Tribunal does not have the mandate to set aside or dismiss a notice of violation or a decision of the Minister on circumstantial, humanitarian or financial grounds, nor is it empowered to do so.

4. Disposition

[32] The Tribunal corrects the inadvertent mistake as to the date of the violation in the Minister's Decision and otherwise confirms it. As a result of section 15 of the

AMP Regulations, the monetary penalty of \$800 is payable by Mr. Li to the Canada Border Services Agency under Notice of Violation YVR09725 within thirty (30) days after the day on which this decision is served.

[33] Mr. Li may contact the Agency's representatives to inquire whether they would agree to a payment schedule for the penalty amount.

[34] The Tribunal wishes to inform Mr. Li that this violation is not a criminal offence. After five years, Mr. Li is entitled to apply to the Minister of Agriculture and Agri-Food to have the violation removed from the records, in accordance with section 23 of the AMP Act.

Dated at Ottawa, Ontario, on this 13th day of April, 2016.

Dr. Donald Buckingham, Chairperson